

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMON DARNEL MOTEN,

Defendant-Appellant.

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UNPUBLISHED

June 10, 2003

No. 237220

Saginaw Circuit Court

LC No. 00-019124-FC

Before: Fitzgerald, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial for two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f)(v) (use of force or coercion to accomplish sexual penetration and the victim suffers personal injury), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(f) (use of force or coercion to accomplish sexual contact and the victim suffers personal injury). Defendant was sentenced to twenty-two to forty years' imprisonment for each count of CSC I, and eight to fifteen years' imprisonment for CSC II. We affirm.

This case arose when defendant broke into his neighbor's mobile home and waited for her to return. When she did, he grabbed her and forced her into a room where he performed cunnilingus on her against her will, digitally penetrated her vagina against her will, and forced her to touch his penis.

Defendant first argues that the prosecutor's exhibition of a videotape and photographs of the crime scene, in addition to an officer's testimony about the crime scene, prejudicially compounded the evidence against him and deprived him of a fair trial. Ordinarily, we review for an abuse of discretion a trial court's decision whether to admit a given piece of evidence. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, defendant failed to preserve this issue when he failed to object during the testimony or presentations. MRE 103; *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). Thus, reversal is not warranted absent plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A photograph is not rendered inadmissible by a witness' ability to testify about the items depicted, and a photograph may be used to corroborate a witness' testimony. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod and remanded on other grounds 450 Mich 1212

(1995). Furthermore, repetition of evidence does not warrant an objection unless it results in unfairness that substantially outweighs its probative value. See MRE 403. A party must lay a foundation for the admission of photographs to demonstrate their importance to the jury. See *People v Barker*, 101 Mich App 599, 603; 300 NW2d 648 (1980). The photographs, videotape, and testimony exhibited by the prosecutor in this case each played a separate role in depicting the scene for the jury. Further, the images and testimony were not graphic or otherwise inflammatory. Therefore, the prosecutor's presentation was not objectionable. See MRE 403.

Defendant next argues that the trial court erred when it excluded his prior consistent statement. The trial court did not abuse its discretion in this regard, however, because defendant clearly made the statement to police after his motive to fabricate arose. See *People v Rodriguez*, 216 Mich App 329, 331-332; 549 NW2d 359 (1996). Similarly, the trial court did not abuse its discretion when it excluded defendant's former girlfriend's out-of-court statement. The statement did not contradict her in-court testimony as MRE 613(b) requires, and the statement also concerned a collateral issue. See *People v Rosen*, 136 Mich App 745, 758-759; 358 NW2d 584 (1984).

Defendant also argues that the prosecution deprived him of a fair trial when it improperly vouched for its witnesses' credibility. This Court reviews de novo whether a prosecutor's misconduct deprived a defendant of a fair trial. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Again, defendant failed to object to the prosecution's statements at the time they were made, so defendant forfeits this issue unless an objection could not have cured the error or unless a failure to review the issue would result in a miscarriage of justice. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

When credibility is an issue, a prosecutor may draw the jury's attention to those facts that make the defense's witnesses, including a defendant, less believable. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). A prosecutor need not illustrate credibility flaws in bland terms, but rather may vividly contrast the opposing witnesses' credibility. *Id.* In this case, the prosecutor's comments do not amount to more than a request that the jury compare the witnesses' motives to fabricate, so they were not objectionable.

Defendant next argues that he was deprived of his right to counsel when his trial counsel failed to object to these errors and preserve an objection to the inadmissibility of defendant's prior statement. To the contrary, defendant's trial counsel did adequately preserve the issue concerning defendant's statement because the context of the questioning adequately reflected the substance of the statement. See MRE 103(a)(2). Moreover, because the issues raised by defendant do not amount to error, his trial counsel was not required to object to them. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Finally, defendant argues that the trial court erred when it assigned him fifty points on offense variable (OV) 7. We disagree. Whether a sentence imposed by a trial court accords with the statutory guidelines is a question of law reviewed de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). When evidence supports a score that a trial court gives a defendant on a particular variable, however, this Court will not disturb that score absent an abuse of the trial court's discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Former MCL 777.37, in effect at the time of defendant's sentencing before amendment by 2002 PA 137, provides that a defendant warrants fifty points on OV 7 when the defendant's

conduct constitutes “aggravated physical abuse.” Evidence in this case indicated that defendant secretly entered the victim’s home and waited in a spare room. Defendant then suddenly grabbed the victim as she passed by and lifted her into her bedroom where he forced her to perform and submit to sexual acts. Under these circumstances, the trial court had sufficient evidence on which to base a score of fifty points for OV 7.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Joel P. Hoekstra

/s/ Peter D. O’Connell